
(2017) 11 BOM CK 0086
In the Bombay High Court
Case No : 269 of 2012

Rajesh s/o. Kewalramji Chute

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-11-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 376](#),
[Section 506](#) - Punishment for rape - Punishment for
criminal ,intimidation

Citation : (2017) 11 BOM CK 0086

Hon'ble Judges : Rohit B. Deo

Bench : SINGLE BENCH

Advocate : Amit M. Kukday, P.S. Tembhare

Judgement

1. Exception is taken to the judgment and order dated 6.6.2012, in Sessions Trial 52 of 2010, delivered by the Sessions Judge, Bhandara, by and under which, the appellant (hereinafter referred to as "the accused") is convicted for offence punishable under section 376 of the Indian Penal Code ("IPC") and is sentenced to suffer rigorous imprisonment for three years and is further convicted for offence punishable under section 506 of the IPC and is sentenced to payment of fine of Rs. 2000/.

2. Heard Shri. Amit Kukday, the learned counsel for the accused and Shri. P.S. Thembhare, the learned Additional Public Prosecutor for the respondent / State.

3. The learned counsel for the accused submits that the evidence of the prosecutrix, who is examined as PW 1, is not implicitly reliable and confidence inspiring. The learned counsel for the accused Shri. Amit Kukday, would submit that the evidence of the prosecutrix ought to have been tested more cautiously in view of the admitted bad blood between the prosecutrix and the accused. It is also not in serious dispute that the accused is residing with his parents and is in possession of the major portion of the agricultural land and that the brother of the accused (husband of the prosecutrix) and the prosecutrix are cultivating only

1 acre of the ancestral agricultural land and are residing separately. In this backdrop, that no injuries are visible on the person of the prosecutrix including the genitalia, no signs of injury are found in the medical examination of the accused, no signs of forcible sexual intercourse were seen in the spot panchanama, like broken pieces of bangles, the inherent improbability clouding the version of the prosecutrix that at 12.00 noon in a crowded locality, the brother in law of the prosecutrix dragged her to his residence, threatened her of physical harm and then ravished her for 10 to 15 minutes, are all cumulative circumstances which would suggest that the defence of false implication is more than probalised on the touchstone of preponderance of probabilities.

4. Per contra, Shri. P. S. Tembhare, the learned Additional Public Prosecutor would submit, interalia relying on the judgment of the Apex Court in Vijay alias Chinee ..vs.. State of Madhya Pradesh, (2010) 8 Supreme Court Cases 191 that absence of injuries on the person or on the private parts of the prosecutrix is not decisive and the possibility of forcible sexual intercourse is not excluded ipso facto by the absence of injuries on the person of the prosecutrix, particularly if the prosecutrix is a married woman. My attention is invited to the following observations in the said judgment: Injury on the person of the prosecutrix "25. In Gurucharan Singh v. State of Haryana this Court has held that : (SCC p. 753, para 8) the absence of injury or mark of violence on the private part on the person of the prosecutrix is of no consequence when the prosecutrix is minor and would merely suggest want of violent resistance on the part of the prosecutrix. Further absence of violence or stiff resistance in the present case may as well suggest helpless surrender to the inevitable due to sheer timidity. In any event, her consent would not take the case out of the definition of rape". "26. In Devinder Singh v. State of H.P. a similar issue was considered by this Court and the Court took into consideration the relevant evidence wherein rape was alleged to have been committed by five persons. No injury was found on the body of the prosecutrix. There was no matting on the pubic hair with discharge and no injury was found in the genital areas. However, it was found that the prosecutrix was used to sexual intercourse. This Court held that the fact that no injury was found on her body only goes to show that she did not put up resistance". The learned Additional Public Prosecutor, Shri. P.S. Tembhare would further submit, that the prosecutrix has deposed that she was threatened which explains the absence of resistance and therefore, the absence of injury on the person of the prosecutrix. The evidence of the prosecutrix is more than amply corroborated by the evidence of PW 3 - Devidas Bramhankar and PW 4 - Homraj Chute, is the submission.

5. The learned Additional Public Prosecutor, Shri. P.S. Tembhare would submit, that even in the absence of corroboration, conviction can rest on the sole testimony of the prosecutrix.

6. In all fairness, Shri. Amit Kukdey, the learned counsel for the accused has no demur with the settled position of law that the conviction can rest on the uncorroborated sole testimony of the prosecutrix. However, Shri Amit Kukdey

contends that this Court is not obligated to seek corroboration only if the evidence of the prosecutrix is found to be implicitly reliable and trustworthy. The prosecutrix is certainly not an accomplice for this count to seek corroboration which would be adding insult to the injury. However, it is not as if the version of the prosecutrix must be accepted as gospel truth, is the submission of the learned counsel for the accused.

7. I have given my anxious consideration to the evidence on record, the submissions canvassed by the learned counsels and the reasoning of the learned Sessions Judge.

8. Concededly, the prosecutrix is the wife of the elder brother of the accused. It is brought on record that the prosecutrix had lodged a police complaint against the accused. The circumstances in which the police complaint was lodged is blurred, however, it appears to be a position not seriously disputed that there is a vertical divide in the family, the accused and his parents residing separately and cultivating the major chunk of the family land with the help of cattle and elder brother of the accused and the prosecutrix residing separately and cultivating a relatively small holding of agricultural land, admeasuring 1 acre.

9. It is the case of the prosecution, as is unfolded during the course of trial, that on the date of incident, the husband of the prosecutrix and the in laws were away from village Mahalgaon to attend a marriage and the prosecutrix was alone in the house. The prosecutrix looked after the household work till 9.00 a.m., then went to the field, gave water to the bullocks, and then took them to the cattle shed. When the prosecutrix was tying the second bullock, the accused came in the cattle shed, dragged the prosecutrix by her hair, pressed her mouth, took her in his house and after bringing her down on the cot sexually ravished her. The prosecutrix deposes that she was threatened by the accused that she will be killed if she resists. The accused undressed the prosecutrix, undressed himself and then sexually violated her private part, is the deposition.

10. According to the prosecutrix, she was driven out from the house by the accused who inflicted a fist blow on her head, the prosecutrix then went to the house of her uncle Devidas Bramhankar - PW 3 and narrated the incident. The prosecutrix states in the examination in chief that after narrating the incident to PW 3 - Devidas Bramhankar, she alone went to the Police Station Sakoli and lodged report which was reduced in writing (Exh. 17). The prosecutrix then states that she was referred to the Bhandara Hospital for medical examination. She showed the spot to the police and her clothes were seized. The prosecutrix then states that Devidas Bramhankar - PW 3 had informed her husband about the incident telephonically. In the next breath, she retracts and states that it was Homraj Chute - PW 4, who informed her husband about the incident and that she had called on Homraj Chute. It is brought on record in the cross examination of PW 1 that the agricultural land is recorded in the name of her brother in law and the total land admeasures 5 acres. Prosecutrix admits that after the accused was sent to judicial custody, 1 acre land was given to her husband. She further

admits that prior to the said giving of land, her father in law did not hand over possession of any land to her husband. She admits that prior to two years of the alleged incident, there was a physical altercation between accused and her husband and that a police report against accused was lodged by the husband of the prosecutrix and the prosecution is pending in the Sakoli Court. It is also extracted that the husband of the prosecutrix was cultivating the land of Gajubai, grand mother of the husband of the prosecutrix and the accused and since there was a quarrel between Gajubai and the husband of the prosecutrix, the arrangement was terminated and Gajubai is allowing others to cultivate the land on ?batai? basis. It is admitted that the land is cultivated with the help of tractor and that the prosecutrix and her husband do not own cattle like bullocks, shebuffaloes and cows and that all the cattle are in possession of the accused. It is elicited in the crossexamination of the prosecutrix that there are several houses which are situated adjacent to the house of the accused and there is also borewell in the courtyard of the accused which is accessed by the neighbours to fetch water. The attempt is to demonstrate that the version of the prosecutrix that during the morning or afternoon time, she was dragged by her heir to the residence of the accused and then forcibly ravished for 10 to 15 minutes is an inherently incredible story which must necessarily receive corroboration.

11. PW 2 - Mukundaji Chute, is the husband of the prosecutrix. However, the evidence of PW 2 corroborates the evidence of the prosecutrix only to the extent that he speaks of having received a call from the prosecutrix, who borrowed the mobile of PW 4, informing PW 2 that she was forcibly ravished by the accused. The husband of the prosecutrix, states that since he was out of station, he is not in a position to state as to whether the version of the prosecutrix is true or false. PW 3 - Devidas Bramhankar, speaks of the prosecutrix having narrated the incident and then of he having followed the prosecutrix on bicycle to the Police Station. PW 3 admits that the prosecutrix and her husband do not have cordial relations with the accused and the parents of the accused and the husband of the prosecutrix. PW 4 - Homraj states that he handed over his mobile to the prosecutrix on 21.5.2010 after 12 O'clock in the afternoon which was used by the prosecutrix to talk with her husband. Investigating Officer - Bishambar Pallearwar is examined as PW 9, who admits that there were no pieces of broken bangles in the cattle shed. The cattle shed was open at two sides, is the deposition. It is brought on record that the Investigating Officer is not aware whether he has recorded the statements of the parents of the accused or those of the neighbours of the complainant and the accused.

12. I am inclined to accept the submission of the learned counsel for the accused Shri. Amit Kukdey that there are too many gray areas in the prosecution case for this Court to permit the conviction to rest on the sole evidence of the prosecutrix. Firstly, the defence has successfully brought on record that the relationship between the prosecutrix and her husband on one hand and the accused and parents of the accused and the husband of the prosecutrix, on the other, is strained. The instances of physical altercations, police reports and the

pending prosecution are elicited in the cross-examination of the prosecutrix. The allegation that the accused threatened the prosecutrix with a knife or a knife like object is obviously a figment of the prosecutrix's imagination. No such object is seized from the accused. According to the prosecutrix, the incident occurred at 11.45 a.m. or 12.00 noon, she was dragged by her hair with mouth gagged from the cattle shed to the house of the accused and then forcibly ravished for 10 to 15 minutes. The learned Additional Public Prosecutor is right in contending that ipso facto, the absence of injury will not exclude forcible sexual intercourse if the victim is a married woman. But then, since the prosecutrix alleges that she was forcibly dragged, gagged, brought down on the cot and ravished for 10 to 15 minutes by younger brother of her husband, the absence of injury on the person of the prosecutrix and on the person of the accused, is not consistent with such version. The version of the prosecutrix that she was threatened by knife or knife like object and that accused threatened to kill her if she resisted, is doubtful to say the least. The spot panchanama and the admissions extracted in the evidence of the prosecutrix would reveal that both, the cattle shed (which is open on both sides) and the distance between cattle shed and the house of the accused is open to public gaze. I find it extremely difficult to believe the version of the prosecutrix that she was dragged from cattle shed in the manner in which she has alleged and that the accused was in a position to sexually ravish the prosecutrix for 10 to 15 minutes, with the prosecutrix having no opportunity to raise an alarm or to seek help from the neighbours and other villagers who concededly used the borewell in the courtyard of the accused to fetch water. The learned Additional Public Prosecutor Shri. P.S. Tembhare, in all fairness, does not dispute the submission that there is no scientific evidence on record to connect the accused with the incident. The clothes of the prosecutrix and the accused were seized and sent for Chemical Analyzer. But then, the report of the Chemical Analyzer does not take the case of the prosecution any further.

13. The evidence of the prosecutrix, as observed earlier, is not at all confidence inspiring. It would be apposite to refer to the following observations of the Apex Court, in *Sadashiv Ramrao Hadbe..vs..State of Maharashtra and Another*, (2006) 10 SCC 92. "7. The doctor, who examined the prosecutrix at about 3 p.m., did not find any injury on her body. There was only swelling on the upper lip but the prosecutrix had no case that this swelling on the upper lip was caused during the course of the incident. There were no injuries on her private parts and the doctor who had examined her was unable to give any opinion about the sexual intercourse allegedly taken place. It is important to note that vaginal swab was collected by the doctor and it was sent for chemical examination. Exhibit 43 is the pathological report and it shows that Microscopic examination of the Vagina swab showed desquamated cervical cells and few Cooxalate crystals and fluid but no spermatozoa was found. The Swab of Vagina was taken on the same day and if any sexual intercourse had taken place in all probabilities, the vaginal swab would have contained some spermatozoa. The absence of these sperms cast a serious doubt on the prosecution version".

"8. It may also be noticed that the appellant was medically examined on the same day by PW10. In his evidence, he stated that smegma was present around the coronoglandis. He further deposed that his examination negated sexual intercourse and for collection of smegma around coronoglandis a period of 24 hours is required. This scientific evidence also did not support the prosecution. Had there been a vigorous sexual act as alleged by the prosecutrix there could not have been the presence of smegma on his private part".

"9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen".

"10. In the present case there were so many persons in the clinic and it is highly improbable that the appellant would have made a sexual assault on the patient who came for examination when large number of persons were present in the near vicinity. It is also highly improbable that the prosecutrix could not make any noise or get out of the room without being assaulted by the doctor as she was an able bodied person of 20 years of age with ordinary physique. The absence of injuries on the body improbably belies the prosecution version".

I consider it absolutely unsafe and hazardous to let the conviction rest on the evidence of the prosecutrix. The judgment and order impugned is set aside. The accused is acquitted of the offence punishable under Sections 376 and 506 of the Indian Penal Code. Fine paid by the accused, if any, be refunded. The bail bond of the accused shall stand discharged. The appeal is allowed. Fees of the counsel for the accused are quantified at Rs. 5,000/.